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No. 90-1873

In the Supreme Court of the United States

OCTOBER TERM, 1991

J. GORDON BINGHAM, ET AL., PETITIONERS

v.

NATIONAL CREDIT UNION ADMINISTRATION BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the National Credit Union Administration acted within its authority in placing a federally insured credit union into conservatorship and issuing a temporary cease-and-desist order directing certain credit union officials and companies owned by those officials not to interfere with the conservatorship.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 927 F.2d 282. The orders of the district court (App., *infra*, 1a-5a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1991. The petition for a writ of certiorari was filed on June 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. First Central Credit Union of Memphis, Tennessee, was a state-chartered credit union insured under the Federal Credit Union Act. See 12 U.S.C. 1781(a). Petitioner J. Gordon Bingham was the presi-

dent of the credit union and the treasurer of its board of directors. His wife, petitioner Brenda Bingham, was the credit union's vice-president. Pet. App. 2.

In January 1989, the credit union entered into four contracts with the Binghams or companies owned by them. The first contract obligated the credit union to pay the Binghams $48,000 per year for seven years for management services. The second contract gave a data processing company owned by the Binghams the right to provide data processing services to the credit union for seven years for a fee of approximately $156,000 per year. Under a third contract, an insurance-related company owned by the Binghams was given exclusive rights, for seven years, to market insurance to credit union members and to have insurance premiums paid through payroll deductions from credit union accounts. The fourth contract was a lease for the building in which the credit union was located. The Binghams had purchased the building three years earlier for $175,000. The contract provided that the credit union would pay the Binghams $72,000 per year for 15 years to rent sixty percent of the building's space. Pet. App. 2-3.

In February 1989, an examination conducted by the National Credit Union Administration (NCUA) revealed that the credit union was operating at a net loss. NCUA officials expressed concern about delinquent loans and collection problems, as well as an increase in the credit union's operating expenses that was likely to occur as a result of the January 1989 contracts. By June 1989, it was apparent that the credit union was experiencing abnormally high losses on loans as well as excessive operating expenses. On October 31, 1989, the credit union submitted a statement of financial condition to the NCUA which revealed that the credit union had lost $273,563.23 from January through October 1989. Pet. App. 2-4.

On or about December 15, 1989, the NCUA (with the approval of the relevant state authorities, see

C.A. App. 90-91; 12 U.S.C. 1786(h)(2)(A)) issued an order appointing itself conservator of the credit union. Pet. App. 4. The order of conservatorship stated that, pursuant to 12 U.S.C. 1786(h)(1), the NCUA was taking possession and control of the credit union to conserve its assets and to protect the interests of the credit union's members and the National Credit Union Share Insurance Fund. Pet. App. 24-45; see 12 U.S.C. 1786(h)(1)(A). In addition to the conservatorship order, the NCUA issued a temporary cease-and-desist order directing the Binghams and their companies not to interfere with the NCUA in its capacity as conservator, to "[c]ontinue to provide adequate space for the credit union as provided for in the lease agreement, until a determination is made by the conservator on the continuation of the lease agreement," and to "[c]ontinue to provide data processing services as provided for in the data processing contract, until a determination is made by the conservator on the continuation of the contract."[1] Pet. App. 13. The temporary order provided that a hearing would be held to determine whether a permanent cease-and-desist order was warranted. Pet. App. 11-23; see 12 U.S.C. 1786(e) and (f).

2. Petitioners applied to the United States District Court for the Western District of Tennessee for an injunction setting aside the temporary cease-and-desist order pending the completion of administrative proceedings relating to the permanent cease-and-desist order. They also sought an order requiring the NCUA to show cause why it should not be enjoined from acting as conservator. Pet. App. 5 & n.1; see 12 U.S.C. 1786(f)(2) and (h)(3).

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[1] The Federal Credit Union Act provides that, in its capacity as conservator, the NCUA is empowered to repudiate contracts, including leases, where appropriate. 12 U.S.C. 1787(c) (1988 & Supp. I 1989). See also 12 U.S.C. 1786(h)(9), 1787(b)(2)(G)(ii) (1988 & Supp. I 1989).

After an evidentiary hearing, the district court rejected petitioners' challenge to the temporary cease-and-desist order. App., *infra*, 1a-2a. The court noted that the NCUA had withdrawn the temporary order (see Pet. App. 47-50), and that, accordingly, the question of its validity was moot. The district court also rejected petitioners' challenge to the order of conservatorship. The court found ample support in the record for the NCUA's decision to impose the conservatorship, and held that the order was not arbitrary or capricious. App., *infra*, 3a-5a.

3. The court of appeals affirmed. Pet. App. 1-10. The court of appeals agreed with the district court that petitioners' challenge to the temporary cease-and-desist order was moot. The court noted that, before the district court, petitioners' lawyer had conceded that the NCUA's dismissal of the cease-and-desist order mooted petitioners' challenge to that order. When the order was withdrawn, petitioners had received the relief they had requested. Moreover, the court of appeals concluded, the issue is not one that is capable of repetition, yet evading review. Pet. App. 6-7.

As to the conservatorship order, the court of appeals stated that "the sole inquiry on judicial review is whether a statutory ground existed for the [NCUA's] appointment of a conservator or a receiver." Pet. App. 8. The court determined that conservatorship was warranted under 12 U.S.C. 1786(h)(1)(A), which provides that the NCUA Board

> may, *ex parte*, without notice, appoint itself as conservator and immediately take possession and control of the business and assets of any insured credit union in any case in which * * * the Board determines that such action is necessary to conserve the assets of any insured credit union or to protect the [Insurance] Fund or the interests of the members of such insured credit union.

The court noted that the district judge made "undisputed findings" that the credit union "was losing money, had suffered operating losses, had operating problems, had serious problems with its contracting procedure, and a possible conflict of interest." Pet. App. 9. Accordingly, the court concluded that conservatorship was warranted under Section 1786(h)(1)(A). Pet. App. 9-10.[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. Both courts below correctly held that petitioners' challenge to the temporary cease-and-desist order became moot when the NCUA withdrew the order. As a result of the NCUA's action, petitioners received all the relief they were seeking in the district court. Because there was nothing left for the district court to decide, the court had no occasion to hold a hearing on the cease-and-desist order or to consider the standard of review applicable to such orders. Consequently, petitioners' counsel was correct to concede in the district court that petitioners' request for an injunction was moot. C.A. App. 106.[3]

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[2] The court of appeals also rejected petitioners' argument that they were denied due process by imposition of the conservatorship prior to a hearing. Pet. App. 8 n.3 (citing *Fahey* v. *Mallonee*, 332 U.S. 245 (1947)).

[3] There is no basis for petitioners' contention (Pet. 36) that the NCUA must issue a cease-and-desist order before it can issue a conservatorship order. The statute, which grants the NCUA broad powers to "immediately take possession and control" of failing credit unions to conserve assets and protect the insurance fund, 12 U.S.C. 1786(h)(1), imposes no such requirement. Moreover, petitioners are incorrect in asserting (Pet. 39-40) that 12 U.S.C. 1786(f)(1) requires a hearing even after the NCUA withdraws a cease-and-desist order. The statute provides that a temporary cease-and-desist order shall remain in

2. The courts below correctly rejected petitioners' challenge to the order of conservatorship. The NCUA is authorized to place a federally-insured credit union into conservatorship if it determines that such action is necessary to conserve the credit union's assets or to protect the credit union's members or the insurance fund. 12 U.S.C. 1786(h)(1)(A). Such a determination by its nature calls for the exercise of a substantial measure of judgment and discretion. Where the agency entrusted by Congress with oversight of federally-insured credit unions must act promptly and decisively to preserve the condition of a financial institution, the agency's actions are entitled to substantial deference. See generally *United States* v. *Gaubert*, 111 S. Ct. 1267, 1277 (1991) (decision to appoint a conservator or receiver involves "a great 'element of judgment or choice'") (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)); *American Bank N.A.* v. *Clarke*, 933 F.2d 899 (10th Cir. 1991) (decision to close a bank as insolvent is "highly discretionary").[4]

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effect, unless modified or set aside by a court, "pending the completion of the administrative proceedings pursuant to such notice [of charges] and until such time as the Administration shall dismiss the charges specified in such notice." Here, the NCUA terminated all administrative proceedings with respect to the cease-and-desist order and dismissed all charges with respect to that order.

[4] Petitioners are wrong in contending (Pet. 44-45) that the court of appeals should not have drawn an analogy between judicial review of NCUA conservatorship orders and judicial review of FHLBB (the former Federal Home Loan Bank Board) conservatorship orders. Congress viewed the NCUA's conservatorship authority as analogous to that of the FHLBB. See S. Rep. No. 536, 97th Cong., 2d Sess. 51 (1982) ("The proposed conservatorship authority [for the NCUA] is similar to that available to the Comptroller of the Currency and Federal Home Loan Bank Board."). Thus, although the FHLBB no longer exists, see *Gaubert*, 111 S. Ct. at 1271 n.1, the analogy remains valid.

In this case, the NCUA's order of conservatorship set forth in detail the factual and legal basis for its action. Contrary to petitioners' suggestion (Pet. 45), the NCUA did not issue the order of conservatorship based simply on a determination that the credit union was engaged in unsafe or unsound practices. Instead, consistent with Section 1786(h)(1)(A), the NCUA determined that conservatorship was necessary "to conserve the assets of the credit union and protect both the interest of the [insurance fund] and the members of the credit union." Pet. App. 43; see *id.* at 24-46. Following a lengthy evidentiary hearing, "the district court found that the credit union was losing money, had suffered operating losses, had operating problems, had serious problems with its contracting procedure, and a possible conflict of interest." Pet. App. 9. Petitioners do not dispute those findings.

In addition, the Binghams entered into a series of contracts with the credit union from which they stood to make substantial sums during a period in which the credit union was operating at a loss. This pattern of self-dealing is particularly troubling in light of the fact that the NCUA had notified the credit union in 1987 that it was not to enter into any contracts with the Binghams without the NCUA's approval, and that the NCUA would consider such contracts a basis for taking administrative action. See Pet. App. 38; see also *id.* at 15-17. These facts fully justified the NCUA's decision to issue a conservatorship order in this case.[5]

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[5] We are informed by the NCUA that the credit union has been liquidated and its charter cancelled by Tennessee authorities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1991

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil No. 89-3138-HB

J. GORDON BINGHAM, JR., ET AL.,
PLAINTIFFS,

VS.

NATIONAL CREDIT UNION ADMINISTRATION BOARD,
DEFENDANT.

ORDER OF DISMISSAL

Because of the filing of the Notice of Dismissal of Temporary Cease and Desist Order and Notice of Charges and Hearing by the National Credit Union Administration Board and based upon statements of counsel for the parties that said dismissal renders the issues in this suit moot, it is therefore

ORDERED that this case is hereby dismissed.

Signed this 31 day of January, 1990.

/s/ Odell Horton
ODELL HORTON
United States District Judge

Approved:

_____

ALBERT H. BOYD
Attorney for Plaintiffs

W. HICHMAN EWING, JR.
United States Attorney

By: /s/ Joe A. Dycus
JOE A. DYCUS
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil No. 89-3137-HB

FIRST CENTRAL CREDIT UNION,
MEMPHIS, TENNESSEE,
J. GORDON BINGHAM, JR., ET AL.,
PLAINTIFFS,

VS.

NATIONAL CREDIT UNION ADMINISTRATION BOARD,
DEFENDANT.

ORDER GRANTING ORAL MOTION
TO AMEND COMPLAINT
AND ORDER DISMISSING COMPLAINT

Upon the oral motion of plaintiffs, made during the hearing of this cause, to amend the complaint to add as a plaintiff First Central Credit Union, Memphis, Tennessee, it is hereby

ORDERED that the motion is granted and First Central Credit Union, Memphis, Tennessee is added as a plaintiff to this complaint.

This action came on for a hearing before the court on the plaintiffs' motion for an Order to Show Cause why the defendant, National Credit Union Administration Board, should not be enjoined from continuing its possession and control of all books, records, assets and business of plaintiff, First Central Credit Union, Memphis, Tennessee, pursuant to 12 U.S.C. §1786(h)(3). For the reasons stated below and the reasons set forth by the court in its oral findings of fact and conclusions of law, which were stated at the conclusion of the hearing in this matter, and which oral

findings and conclusions are incorporated herein by reference, the Order to Show Cause is set aside, the injunction is denied and this cause of action is dismissed.

Under section 206(h)(1) of the Federal Credit Union Act, Congress has given the National Credit Union Administration Board broad power to appoint the Administration as conservator of any insured credit union. The standard enunciated in the Act is that the Board determine that such "action is necessary to conserve the assets of any insured credit union or to protect the Fund or the interests of the members of such insured credit union . . ." 12 U.S.C. §1786(h)(1)(A).

The court's standard of review under the Act is restricted to making sure that the Administration's action is not arbitrary and capricious. The court starts out with the presumption that the Administration properly exercised its powers. The administrative record and the testimony and exhibits introduced at the hearing of this matter demonstrate that the Administration had a reasonable basis for its determination that a conservatorship was necessary under the standards of 12 U.S.C. §1786(h)(1)(A). Further, the proof and exhibits put forth by the plaintiffs failed to demonstrate that the actions of the Administration were arbitrary and capricious.

The standards for a preliminary injunction in this circuit require the court to weigh equitably: whether the plaintiffs have shown irreparable injury; whether the plaintiffs have shown a likelihood of success on the merits of their claim; whether the relief would substantially harm other parties interested in the proceedings; and whether the public interest would be served by the relief sought. For the reasons stated by the court at the conclusion of the hearing in this matter, the court is not satisfied that the possible harm to plaintiffs is outweighed by the public interest in the Administration's protecting the assets of

the credit union, the interests of the members of the credit union and the insurance fund. Furthermore, plaintiffs have failed to demonstrate a likelihood of success on the merits in this cause. Therefore, it is hereby

ORDERED that the court's Order to Show Cause is set aside, that plaintiffs' motion for a preliminary injunction is denied, and that this cause of action is dismissed.

Signed this 31 day of January, 1990.

/s/ Odell Horton
ODELL HORTON
United States District Judge

Approved:

ALBERT H. BOYD
Attorney for Plaintiffs

W. HICHMAN EWING, JR.
United States Attorney

By: /s/ Joe A. Dycus
JOE A. DYCUS
Assistant United States Attorney

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